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CTI Group Inc v International Bulk Carrier SPA

HIGH COURT (KOTA KINABALU) — CIVIL CASE NO LBN-24-8/7 OF 2013
RAVINTHRAN J
3 FEBRUARY 2014

Arbitration — Arbitration clause — Incorporation of arbitration clause — Incorporation by reference — Defendant signed guarantee documents annexed to contract between third parties which contained arbitration agreement for settlement of disputes — Annexures referred to contract and formed integral part of it — Defendant aware of provisions of contract when it signed annexures — Whether arbitration clause in contract incorporated into defendant's agreement by reference and bound defendant — Section 9(5) of the Arbitration Act 2005 ('the AA') — Whether party seeking to set aside recognition and enforcement order made under s 38 of the AA must base application on grounds stated under s 39

The plaintiff and three other parties — CNAN, Pharaon and Laradji — executed a share transfer agreement ('the STA') under which CNAN, sold 51% of its shares in the defendant, which it wholly owned, to the other three parties. Although the defendant was not party to the STA, a clause in it stated that the defendant would guarantee the payment of the balance purchase price (an initial sum had already been paid) by the three buyers to CNAN. The same guarantee clause contained two other provisions — that the buyers would assign the balance purchase price to the defendant ('the assignment') and that the defendant would deposit an amount equivalent to the balance purchase price into a bank account and pledge the same as security in favour of CNAN ('the pledge'). Both the assignment and the pledge, which were signed by the defendant on the same date the STA was signed, were, respectively, marked as Annexures 6 and 7 to the STA and constituted an integral part of it. The plaintiff, Pharaon and Laradji subsequently agreed to loan USD5m to the defendant. A dispute arose between the parties in respect of that loan and also in respect of reimbursement for the costs of repairs done to three of the defendant's ships which were chartered to the plaintiff under the terms and conditions of the STA. Pursuant to an arbitration clause contained in the STA for disputes to be referred to the International Chamber of Commerce ('the ICC'), the plaintiff and Pharaon commenced arbitration proceedings in France against CNAN, the defendant and Laradji. The defendant raised counterclaims against the plaintiff in the arbitration. The arbitration resulted in a final award in favour of the plaintiff and Pharaon. The plaintiff then obtained an order under s 38 of the Arbitration Act 2005 ('the AA') from the High Court at Kota Kinabalu to recognise and enforce the award. In its instant application to set aside that order, the defendant, instead of relying upon the

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usual grounds for setting aside under s 39 of the AA, based its application upon s 38, arguing that the plaintiff had not satisfied a requirement under s 38(2) of the AA for obtaining the order to recognise and enforce the arbitral award ie that it had failed to produce an arbitration agreement between the plaintiff and defendant. The defendant argued that the only arbitration agreement the plaintiff had produced was the one contained in the STA to which the defendant was not a party and that Annexures 6 and 7 of the STA were not produced. Apart from that ground, the defendant contended that the counterclaim it had raised in the arbitration could not be construed as an arbitration agreement and also that the plaintiff alone was not entitled to enforce the whole of the sum in the arbitral award as it was made in favour of both the plaintiff and Pharaon.

Held, dismissing the application with costs:

(1) The defendant was bound by the arbitration clause in the STA. Annexures 6 and 7, which conferred benefit as well as imposed obligations on the defendant, made clear reference to the STA. The STA itself stated that the two annexures were an integral part of the STA. Section 9(5) of the AA provided that an arbitration agreement could be incorporated by reference if the reference was such as to make the arbitration clause (contained in a separate document) part of the agreement. The arbitration tribunal had also noted that the defendant could not have been unaware of the STA when it executed Annexures 6 and 7. It was irrelevant that the plaintiff did not produce Annexures 6 and 7 when it applied to register the final award under s 38 as the relevant arbitration agreement was contained in the STA. Neither was it fatal that the plaintiff did not produce the counterclaim which was raised by the defendant in the arbitration proceedings (see paras 11 & 14).

(2) The arbitration tribunal made a finding of fact based on the law of the seat of arbitration that the defendant was bound by the arbitration clause contained in the STA. The burden to challenge that finding lay with the defendant but it failed to produce any material to argue that the tribunal had misconstrued French law in coming to that finding of fact. The court was not minded to hold that the tribunal was wrong in its conclusion (see para 16).

(3) The application for the recognition and enforcement order was not defective merely because Pharaon was not joined as a co-plaintiff. Regardless of the fact the plaintiff and Pharaon had bought equal shares in the defendant, the arbitration tribunal stated that they had acted 'jointly and severally' in the final award that was granted in their favour (see para 19).

(4) The application had to be dismissed for non-compliance with s 39 of the AA. Section 38 did not contain any provision for the setting aside of an

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order granted under it. Once the court had satisfied itself that the arbitration award and arbitration agreement had been produced and it had granted the recognition and enforcement order, it was for the defendant to 'request' the court under s 39 to refuse recognition. In the instant case, the defendant did not bring its application within the grounds envisaged under s 39 (see para 21).

[Bahasa Malaysia summary

Plaintif dan tiga pihak yang lain — CNAN, Pharaon dan Laradji — memeterai perjanjian pemindahan saham ('PPS') yang CNAN, menjual 51% sahamnya yang ada di dalam defendan, yang mana ia adalah milik penuh, untuk ketiga-tiga pihak yang lain. Walaupun defendan telah tidak menjadi ahli kepada PPS, klausa di dalamnya menyatakan bahawa defendan akan menjamin pembayaran baki harga beli (peruntukan permulaan telah dibayar) oleh tiga pembeli untuk CNAN. Klausa jaminan yang sama mengandungi dua peruntukan lain — bahawa pembeli akan memberikan harga belian kepada defendan ('penyerahhakan') dan bahawa defendan akan mendepositkan amaun yang bersamaan dengan harga belian ke dalam akaun bank dan memberi jaminan yang sama sebagai jaminan yang memihak kepada CNAN ('jaminan'). Kedua-dua penyerahhakan dan jaminan, yang ditandatangani oleh defendan pada tarikh yang sama SSP ditandatangani, masing-masing ditandakan sebagai Lampiran 6 dan 7 kepada SSP dan merupakan sebahagian dari SSP itu. Plaintif, Pharaon dan Laradji kemudiannya bersetuju untuk memberikan pinjaman sebanyak USD5m kepada defendan. Pertikaian timbul antara pihak-pihak berkenaan dengan pinjaman itu dan juga berkenaan dengan pembayaran balik bagi kos pembaikan dilakukan pada tiga kapal defendan yang disewa kepada plaintif di bawah terma-terma dan syarat-syarat SSP. Menurut suatu fasal timbang tara yang terkandung di dalam SSP untuk pertikaian dirujuk kepada Dewan Perdagangan Antarabangsa (DPA), plaintif dan Pharaon memulakan prosiding timbang tara di Perancis terhadap CNAN, defendan dan Laradji. Defendan membangkitkan tuntutan balas terhadap plaintif dalam timbang tara. Timbang tara menyebabkan award muktamad memihak kepada plaintif dan Pharaon. Plaintif telah memperolehi suatu perintah di bawah s 38 Akta Timbang Tara 2005 ('AT') daripada Mahkamah Tinggi Kota Kinabalu untuk mengiktiraf dan menguatkuasakan award itu. Dalam permohonannya untuk mengetepikan perintah itu, defendan, dari bergantung kepada alasan biasa untuk pengetepian di bawah s 39 AT, berdasarkan permohonan kepada s 38, dengan alasan bahawa plaintif tidak memenuhi keperluan di bawah s 38(2) AT untuk mendapatkan perintah untuk mengiktiraf dan menguatkuasakan award timbang tara iaitu bahawa ia telah gagal untuk menghasilkan suatu perjanjian timbang tara antara plaintif dan defendan. Defendan berhujah bahawa satu-satunya perjanjian timbang tara yang telah dikemukakan oleh plaintif adalah yang terkandung di dalam SSP yang mana defendan tidak menjadi pihak dan Lampiran 6 dan 7 STA telah tidak dikemukakan. Selain alasan itu, defendan menegaskan bahawa tuntutan

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yang telah dibangkitkan dalam timbang tara tidak boleh ditafsirkan sebagai suatu perjanjian timbang tara dan juga bahawa plaintif sahaja tidak berhak untuk menguatkuasakan keseluruhan jumlah wang dalam award timbang tara kerana ia telah dibuat memihak kepada kedua-dua plaintif dan Pharaon.

Diputuskan, menolak permohonan dengan kos:

(1) Defendan telah terikat dengan klausa timbang tara di dalam SSP. Lampiran 6 dan 7, yang memberikan manfaat dan juga mengenakan kewajipan atas defendan, membuat rujukan jelas kepada SSP. SSP sendiri menyatakan bahawa kedua-dua lampiran adalah sebahagian daripada SSP. Seksyen 9(5) AT menyatakan bahawa suatu perjanjian timbang tara boleh digabungkan secara rujukan jika rujukan yang sedemikian adalah untuk menjadikan klausa timbang tara (yang terkandung di dalam dokumen yang berasingan) sebahagian daripada perjanjian itu. Tribunal timbang tara juga telah menyatakan bahawa defendan tidak boleh tidak menyedari SSP apabila ia menguatkuasakan Lampiran 6 dan 7. Ia adalah tidak relevan bahawa plaintif tidak mengemukakan Lampiran 6 dan 7 apabila ia memohon untuk mendaftar award muktamad di bawah s 38 memandangkan perjanjian timbang tara yang berkaitan terkandung di dalam SSP. Begitu juga ia tidak menjejaskan bahawa plaintif tidak mengemukakan tuntutan balas yang dibangkitkan oleh defendan dalam prosiding timbang tara (lihat perenggan 11 & 14).

(2) Tribunal timbang tara membuat dapatan fakta berdasarkan undang-undang tempat timbang tara bahawa defendan telah terikat dengan klausa timbang tara yang terkandung di dalam SSP. Beban untuk mencabar dapatan terletak atas defendan tetapi ia gagal mengemukakan apa-apa material untuk mempertikaikan bahawa tribunal telah tersalah tafsir undang-undang Perancis dalam membuat dapatan fakta. Mahkamah tidak berfikiran untuk memutuskan bahawa tribunal adalah salah dalam kesimpulannya (lihat perenggan 16).

(3) Permohonan bagi pengiktirafan dan penguatkuasaan perintah tidak cacat hanya kerana Pharaon tidak menyertai sebagai plaintif bersama. Tanpa mengira fakta plaintif dan Pharaon telah membeli jumlah saham yang sama di dalam defendan, tribunal timbang tara menyatakan bahawa mereka telah bertindak 'jointly and severally' dalam award muktamad yang diberikan memihak kepada mereka (lihat perenggan 19).

(4) Permohonan itu harus ditolak kerana tidak mematuhi s 39 AT. Seksyen 38 tidak mengandungi apa-apa peruntukan untuk mengetepikan suatu perintah diberikan di bawahnya. Apabila mahkamah sendiri berpuas hati bahawa perjanjian award timbang tara dan timbang tara telah dibuat dan ia telah diberikan pengiktirafan dan penguatkuasaan perintah, ia adalah untuk defendan untuk 'meminta' mahkamah untuk menolak pengiktirafan di bawah s 39. Dalam kes ini, defendan tidak membawa

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permohonannya di dalam sebab-sebab yang dinyatakan di bawah s 39 (lihat perenggan 21).]

Notes

For cases on incorporation of arbitration clause, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1643–1644.

Cases referred to

Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625, FC (refd)

Aughton Ltd v MF Kent Services Ltd (1991) 57 BLR 1, CA (refd)

Star-Trans Far East Pte Ltd v Norske-Tech Ltd & Ors [1996] 2 SLR 409, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 9, 9(4)(c), 9(5), 38, 38(1), (2), 39, 39(1)

Oommen Koshy (Nur Arineh bt Sabtu with him) (Skrine) for the plaintiff.
Arunachalam Kasi (Esther Ong Tengku Saiful & Sree) for the defendant.
Thomas Ting (Ng & Ting) for the proposed intervener.

Ravinthran J:

INTRODUCTION

[1] The plaintiff had obtained a final award in its favour from the International Court of Arbitration in Paris under the Rules of the International Chamber of Commerce ('the ICC'). The final award was handed on 16 April 2013. On 16 July 2013, the plaintiff obtained an order under s 38 of the Arbitration Act 2005 for recognition and enforcement of the said final award from this court. Now, the instant application is an application by the defendant to set aside the said recognition and enforcement order. In the notice of application, the defendant has cited s 38 of the Arbitration Act 2005.

BRIEF FACTS

[2] The dispute between the parties originated from an agreement known as the share transfer agreement ('the STA') which was executed between the plaintiff and several parties. It contains an arbitration clause. The defendant herein is not one of the parties to the STA. The parties who executed the STA are CNAN Group SPA ('the CNAN'), Pharaon Commercial Investment Group Ltd ('Pharaon'), Mr Mustapha Abdelwahab Laradji ('Laradji') and CTI Group Inc ('the plaintiff'). The backdrop to the STA is as follows. CNAN are ship owners. Some of their ships were owned through International Bulk Carrier SPA ('the defendant'). Pharaon is involved in sea transportation

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business. The plaintiff is also a ship owning company. Mr Laradji is an Algerian businessman. Under the terms of the STA executed on 27 September 2007, CNAN sold 51% of its shares in the defendant to Pharaon, Laradji and the plaintiff in the proportion of 24.5%, 24% and 2% respectively. The defendant was a wholly owned subsidiary of CNAN at the time. The total price of the shares was USD9,282,000. The purchasers paid USD6,832,000 upon signing of the STA. The balance of USD2,450,000 was to be paid in five instalments over a five-year period. The plaintiff, Pharaon and Laradji also agreed to grant a loan of USD5m to the defendant. A clause in the STA stated that the defendant would guarantee the payment of the balance of the purchase price of USD2,450,000 to CNAN by the plaintiff, Pharaon and Laradji. In the same guarantee clause, it was stated that the plaintiff, Pharaon and Laradji would assign a part of the debt-claim to CNAN which is limited to the sum of USD2,450,000 which is the balance of the purchase price. This guarantee and assignment is referred to in Annex 6 to the STA which was signed by the defendant. It is also stated in the guarantee clause that the defendant would deposit the said guaranteed sum of USD2,450,000 into a bank account and pledge the same as security in favour of CNAN. This pledge is referred to in Annex 7 to the STA which was also signed by the defendant. Thus in Annexures 6 and 7, the defendant acknowledged its rights and obligations that were created by the STA. It must also be noted that Annexures 6 and 7 were signed by the defendant on the same date as the STA.

[3] Pursuant to the sale of the said shares, the defendant's vessels were chartered to the plaintiff under the terms and conditions of the STA. The STA states that the 'appendices' shall bind the parties in the same manner as the STA and shall constitute 'an integral part' thereof. The STA contained an arbitration clause to refer dispute between the parties in the event of dispute to the International Chamber of Commerce. A dispute arose between the parties in respect of the initial loan of USD5m granted by Pharaon and the plaintiff to the defendant and reimbursement costs of repairs to three vessels. The principal sum claimed as reimbursement by Pharaon and the plaintiff was USD11,522,546.18. In accordance with cl 11.4 of the STA, the plaintiff and Pharaon commenced arbitration proceedings in France against CNAN, the defendant and Laradji. The arbitration proceedings lasted two years. The defendant initially objected to the proceedings on the ground of lack of jurisdiction. However, the defendant did not ask for an interim award. Nonetheless, the defendant raised new counterclaims against the plaintiff which were outside the terms of reference. The arbitration tribunal allowed the addition of new counterclaims. The arbitration tribunal overruled the objection on lack of jurisdiction. The arbitration tribunal noted that the defendant did not raise the jurisdictional objection in later submissions and by submitting counterclaims, it had unconditionally recognised the jurisdiction of the arbitration tribunal. The arbitration tribunal also considered Annexures 6 and 7 which created rights and obligations in respect of the defendant.

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APPLICATION TO SET ASIDE

[4] The grounds of the defendant to set aside recognition and enforcement order dated 16 July 2013 are as follows:

(a) that there was no binding arbitration between the plaintiff and the defendant;

(b) that the counterclaim by the defendant cannot be considered as an arbitration agreement; and

(c) that the plaintiff who is one of two claimants in the arbitration proceedings cannot enforce the award for the whole sum since the final award was in favour of both.

DECISION

[5] The recognition and enforcement order in question was obtained by the plaintiff under s 38 of the Arbitration Act 2005. Sub-sections (1) and (2) of s 38 read as follows:

> (1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.
>
> (2) In an application under subsection (1) the applicant shall produce —
>
> (a) the duly authenticated original award or a duly certified copy of the award; and
>
> (b) the original arbitration agreement or a duly certified copy of the agreement.

[6] Counsel for the plaintiff submitted that the scheme of the Arbitration Act 2005 provides that an application to set aside a recognition and enforcement order under s 38 should be grounded under s 39(1) which reads as follows:

> (1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked —
>
> (a) where that party provides to the High Court proof that —
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
>
> (iii) the party making the application was not given proper notice of the

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appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(vii) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the High Court finds that —

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

[7] Counsel for the plaintiff then proceeded to submit that the instant application does not come within any of the grounds stipulated in s 39. Counsel for the defendant did not seriously dispute this contention but he argued strenuously that the pre-conditions for a recognition and enforcement order under s 38 were not satisfied in the first place. He argued as follows:

> It is respectfully submitted that the challenge taken in our case is not under s 39, but it is under s 38. Only if and when the Plaintiff herein had satisfied s 38(2), the burden would then shift to the Defendant herein to deal with s 39. The Defendant herein does not go that far, but merely questions whether the Plaintiff has satisfied s 38(2).

[8] Counsel for the defendant submitted that production of the arbitration agreement is a precondition under s 38 for registration of the arbitration award. In the instant case, he said that the only arbitration agreement that was produced was the STA. The arbitration agreement is contained in the STA. As the defendant is a not a party to the STA, according to counsel for the defendant, it follows that counsel for the defendant submitted that production of the arbitration agreement is a precondition under s 38 for registration of the arbitration award. In the instant case, he said that the only arbitration agreement that was produced was the STA. The arbitration agreement is contained in the STA. As the defendant is a not a party to the STA, according to counsel for the defendant, it follows that no arbitration agreement was

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produced when the plaintiff applied for the recognition and enforcement order. Counsel for the defendant referred to the definition of an 'arbitration agreement' in s 9 of the Arbitration Act 2005 which reads as follows:

> 9 Definition and form of arbitration agreement
>
> (1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing where it is contained in —
>
> (a) a document signed by the parties;
>
> (b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or
>
> (c) an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
>
> (5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

[9] In the instant case, it is common ground that the plaintiff and the defendant had not signed the STA. The arbitration agreement is only provided in the STA. Only the final award and the STA were produced by the plaintiff before the court for the purpose of the s 38 application. Annexes 6 and 7 were not produced. The crucial issue that arises is whether the defendant is bound by the arbitration clause contained in the STA. I shall consider the argument of the counsel for the plaintiff that the application should have been made under s 39 at the end of this judgment.

WHETHER THERE IS INCORPORATION BY REFERENCE

[10] Counsel for the defendant cited the English Court of Appeal case of *Aughton Ltd v MF Kent Services Ltd* (1991) 57 BLR 1 and submitted that distinct and specific words were required to incorporate an arbitration clause by reference to another document and deprive a party of the ordinary right of access to the court in exchange for a right to arbitrate. Counsel for the defendant also cited the case of *Star-Trans Far East Pte Ltd v Norske-Tech Ltd & Ors* [1996] 2 SLR 409 where the Singapore Court of Appeal held an arbitration clause in a different contract is not to be incorporated by reference

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into the contract unless clear words of incorporation are used. Annexures 6 and 7 which is executed by the defendant makes reference to the STA. However, Annexures 6 and 7 which are essentially a contract of guarantee and a deed of pledge do not specifically provide that the parties to it are bound by the arbitration clauses contained in the STA. Counsel for the plaintiff on the other hand cited the case of *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625 where our Federal Court held that specific reference to the arbitration clause in another document is not necessary. In that case, the sales contracts made a clear reference to the standard terms and conditions ('the STC') that contained an arbitration clause. However, there was no specific reference to the arbitration clause and the STC was not attached to the sales contracts. The Federal Court said as follows:

> We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.

[11] In the instant case, the Annexures 6 and 7 make clear reference to the STA which contains an arbitration clause. The STA itself contains provisions that state that the appendices (which include Annexures 6 and 7) are integral to it. Clause 1.1 defines 'appendices' as:

> the numbered documents, the copies or originals of which have been duly initialed by the Parties and annexed to this Share Sale Agreement and *which constitute integral part hereof*. (Emphasis added.)

[12] Clause 1.2 of the STA, in part, provides as follows:

> The Preamble and the Appendices shall bind the Parties in the same manner as this agreement, of which *they constitute an integral part* ....(Emphasis added.)

[13] In *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd*, the Federal Court considered sub-s (5) of s 9 that provides that an arbitration agreement can be incorporated by reference only if:

> ... the reference is such as to make that clause part of the agreement.

[14] To recapitulate, Annexures 6 and 7 referred to the STA which conferred benefit as well as imposed obligations on the defendant. The STA itself stated that the Annexures 6 and 7 are integral to it. The STA contained an agreement to arbitrate. Furthermore, on the evidence, the arbitration tribunal noted that the defendant could not have been unaware of the STA when it executed Annexures 6 and 7 which are integral parts of the STA. In the premises, I am

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A inclined to accept the argument of counsel for the plaintiff that the arbitration agreement in the STA binds the defendant. I also find that it is irrelevant that the plaintiff did not produce Annexures 6 and 7 when they applied to registered the final award under s 38. This is because the relevant arbitration agreement is contained in the STA.

B

WHETHER THE DEFENDANT A PARTY TO THE STA BY VIRTUE OF THE FRENCH LAW

C **[15]** It was not disputed that the STA created rights and obligations in respect of the defendant. The arbitration tribunal held that under 'arbitration case law and international legal theory, as well as applicable French law' it is established that:

> D 'the extension of the arbitration agreement to a non-signatory is accepted if the agreement containing it creates rights and obligations with regard to the same party'. ... The extension of the arbitration clause is possible insofar as IBC benefited from certain rights and assumed obligations deriving from the Transfer Agreement: loan, charter hire of ships, assumption of repair costs, etc.

E **[16]** The arbitration tribunal has therefore made a finding of fact based on the law of the seat of arbitration that the defendant is bound by the arbitration clause contained in the STA. In my view, the burden to challenge this finding of fact does not lie on the plaintiff. It lies on the party that seeks to displace the finding of the arbitration tribunal. The defendant has not produced any F material to argue that the arbitration tribunal has misconstrued French law in coming to this finding of fact. In the premises, I am not minded to hold the arbitration tribunal was wrong in its conclusion that the defendant was bound by the arbitration agreement contained in the STA.

G WHETHER COUNTERCLAIM BY THE DEFENDANT CONSTITUTES AN ARBITRATION AGREEMENT

[17] Section 9(4)(c) provides that an arbitration agreement can be contained in:

H > ... an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

[18] Counsel for the defendant conceded that by virtue of the above provision, a counterclaim pursued by a party in the arbitration proceedings can I operate as an arbitration agreement. He then submitted that the counterclaim and the defence were not produced together with the arbitration agreement when the plaintiff applied to register the final award under the s 38. Counsel for the plaintiff did not dispute the fact that the counterclaim and defence were not produced to support the s 38 application. In the premises, I agree with counsel

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for the defendant that the counterclaim should have been produced. However, in view of my finding that the arbitration agreement in the STA is binding on the defendant, I hold that the failure to produce the counterclaim is not fatal.

WHETHER THE PLAINTIFF CAN ENFORCE THE FINAL AWARD SINGULARLY

[19] The final award says that CTI and Pharaon 'are acting jointly and severally'. Counsel for the defendant submitted that this means that 'CTI/Pharaon' in the final award meant the plaintiff and Pharaon. He argued that each of the claimants, ie, the plaintiff and Pharaon have equal rights in the final award in the ratio of 50:50. Therefore, the submission of counsel for the defendant is that if the plaintiff wished to claim the whole awarded sum, it should have joined Pharaon or otherwise, they should have limited its claim to half of the awarded sum. Counsel for the plaintiff responded that this argument was only raised in the affidavit in reply of the defendant dated 8 October 2013 which was filed out of time and therefore should not be considered. However, counsel for the plaintiff submitted that since the claimants (the plaintiff and Pharaon) acted 'jointly and severally', the plaintiff has the full right to enforce the judgment either separately or jointly. In my opinion, the application for the recognition and enforcement order is not defective merely because Pharaon was not joined as a co-plaintiff. Regardless of the fact that the plaintiff and Pharaon each bought 24.5% of the shares in the defendant company, the arbitration tribunal stated they had acted 'jointly and severally' in the final award that was granted in their favour.

WHETHER EXECUTION ATTEMPT IN GREECE SHOULD HAVE BEEN DISCLOSED

[20] Counsel for the defendant submitted that the plaintiff failed to disclose in the affidavit in support that they had attempted to execute the final award in Greece. However, I do not think that this omission is material. It is not disputed that the plaintiff did not realise the entire judgment or part of the judgment with the resultant effect the judgment sum claimed herein should be correspondingly reduced. In the premises, I find this to be a non-issue.

WHETHER APPLICATION SHOULD HAVE BEEN MADE UNDER S 39

[21] I noted at the outset that the defendant did not ground this application under s 39(1) of the Arbitration Act 2005. To my mind, counsel for the plaintiff is correct in his argument that the scheme of the Arbitration Act 2005 provides that a recognition and enforcement order that has been obtained under s 38 can only be set aside or refused under s 39. Counsel for the defendant had submitted that only if the pre-condition under s 38(2) is

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satisfied, the burden to set aside the award under s 39 shifts to the defendant. The pre-condition under s 38(2) is the requirement to produce the duly authenticated arbitration award and the arbitration agreement. I have ruled that s 38(2) has been complied with. However, I shall now address this issue for sake of completeness. Section 38 does not contain any provision for the setting aside of an order granted under it. Therefore, in my respectful view, once the court satisfies itself that the arbitration award and arbitration agreement has been produced and grants the recognition and enforcement order, it is for the defendant to 'request' the court under s 39 to refuse recognition. In the instant case, the defendant did not bring the instant application within the grounds envisaged in s 39 of the Act. In fact, counsel for the defendant pointedly submitted that this application is not made under s 39 but under s 38. In the premises, I am also constrained to hold that the instant application must be dismissed for not complying with s 39.

[22] For all the above reasons, the application of the defendant to set aside the recognition and enforcement order made on 16 July 2013 is dismissed with costs of RM25,000. In the premises, I shall also dismiss the application of the defendant for interim stay of execution pending this application with costs of RM1,000.

Application dismissed with costs.

Reported by Ashok Kumar